DECISIONS BY THE FLRA REGARDING THE NEGOTIABILITY OF UNION PROPOSALS CONCERNING COMPETITIVE AREAS

References:

- 5 CFR § 351.402
- 51 FLRA No. 42
- 52 FLRA No. 12
- 52 FLRA No. 33
- 52 FLRA No. 90
- 53 FLRA No. 60
- 54 FLRA No. 30

Introduction:

The Federal Labor Relations Authority (FLRA) has issued a number of decisions regarding the negotiability of union proposals that concern competitive areas. This guide is intended to provide a review of some of the most recent cases on this topic. It is not intended to be an exhaustive review of all applicable case law or as a replacement for case law research.

The concept of the "competitive area" is an important one in the field of federal labor relations. A competitive area is essentially a grouping of employees within an agency, according to their geographical and organizational location, who compete for job retention when a particular position is abolished or some other adverse action constituting a reduction in force (RIF) is imposed. In such circumstances, an employee holding the affected position may be able to prevail over less senior or less qualified employees who hold different positions but are within the same competitive area.

The establishment of competitive areas is governed by 5 CFR § 351.402, as follows:

§ 351.402 Competitive Area

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) A competitive area must be defined solely in terms of the agency's organizational unit(s) and geographical locations, and it must include all employees

within the competitive area so defined. A competitive area may consist of all or part of an agency. The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area.

(c) .....

(d) .....

Federal Labor Relations Authority Decisions:

In **AFGE, Local 32 and U.S. Office of Personnel Management, Washington, D.C., 51 FLRA No. 42 (November 6, 1995)**, the FLRA held that the agency did not have a duty to bargain under section 7117 of the Statute. The union's bargaining proposal had the effect of establishing competitive areas, which included supervisors and managerial personnel.

In this decision, the Authority noted that it was taking this opportunity to review and clarify the relevant statutory provisions and precedent involving the issue of whether the duty to bargain set forth in section 7117 of the Statute extends to bargaining proposals directly implicating persons outside a union's bargaining unit. As a result of this review the Authority concluded that it would no longer follow the precedent established in National Weather Service Employees Organization and National Oceanic and Atmospheric Administration, National Weather Service, 44 FLRA No. 3 (1992), enforced on other grounds sub nom. National Oceanic and Atmospheric Administration, National Weather Service v. FLRA, 7 F.3d 243 (D.C. Cir. 1993).

The AFGE v. OPM case involved a bargaining proposal creating a competitive area that included supervisors and managerial personnel, who were not in the Union's (or any) bargaining unit. In its analysis, the Authority noted that because the Statute expressly defines the term "employee" to exclude supervisory and management personnel, there is no question that supervisory and management personnel are not granted bargaining or other rights under the Statute. The Authority stated that a union is not entitled to bargain on behalf of employees other than those in the bargaining unit for which it is the exclusive representative.

However, the Authority noted that it had previously carved a narrow exception to this limitation on the duty to bargain under the Statute. Under this exception an agency may be obligated to bargain with a union over matters that directly affect individuals other than unit employees insofar as such matters "vitally affect" the terms and conditions of employment of unit employees. The "vitally affects" test looks to the nature and extent of the impact on unit employees' working conditions of a bargaining proposal that directly implicates matters involving third parties. The FLRA explained that there are three types of bargaining proposals which directly affect third parties: 1) those that directly affect nonemployees; 2) those that directly affect employees in other bargaining units; and 3) those that directly affect supervisory personnel. The Authority noted that it previously found a proposal that directly impacted nonemployees to be within the duty to bargain if the proposal vitally affected unit employees' conditions of employment and

was not otherwise prohibited from bargaining. With regard to proposals directly implicating employees in other bargaining units, the Authority has concluded that the vitally affects test does not apply and, accordingly, that such proposals are outside the duty to bargain. Finally, with regard to proposals directly implicating supervisory personnel, the Authority similarly has held, with one exception, that the vitally affects test does not apply and, accordingly, that such proposals are outside the duty to bargain.

The single exception had been National Weather Service. Under National Weather Service, the Authority found a proposal creating a competitive area that includes supervisory employees might be within the duty to bargain if it can be established that the union "does not ... purport or seek to regulate the terms and conditions of employment of management personnel".

Under AFGE v. OPM the Authority concluded that the analysis articulated in National Weather Service was without support in the Statute or relevant case law. It concluded that the approach previously adopted in National Weather Service should no longer be followed. In the Authority's decision for AFGE v. OPM, the Authority noted that the proposal directly determined the working conditions of supervisory personnel and is not within the duty to bargain. The Authority noted that this decision places the Union in a "catch-22" situation -- because the inclusion of supervisors in the proposed competitive area is the unavoidable result of complying with 5 CFR § 351.402. The Authority also noted that it was "mindful that two Authority decisions finding proposed competitive areas that encompassed supervisory employees to be within the mandatory scope of bargaining ... have been enforced by the D.C. Circuit." With this in mind, the Authority stated "we do not reach our decision lightly."

The decision was appealed to the D.C. Circuit Court of Appeals,110 F.3d 810. The Court affirmed the Authority's determination that the proposal, which directly implicated supervisory personnel, was outside the Agency's duty to negotiate.

NAGE, Local R4-6 and Army, Applied Aviation Technology Directorate, 52 FLRA No. 12 (September 4, 1996), the FLRA held that the agency did not have a duty to bargain over a union proposal which limited employee's bump and retreat rights during a RIF. The union's proposal would have required that no bargaining unit employee in a particular agency facility would be displaced from his or her position by anyone outside the facility as a result of a RIF. In effect, the union's proposal precluded employees (unit members, and others, including managers and supervisors, alike) within the competitive area, but outside the directorate, from displacing bargaining unit employees by exercising their rights to bump and retreat to directorate positions during a RIF.

The FLRA held that since the union's proposal would limit the bump and retreat rights of individuals within the same competitive area in a manner inconsistent with the requirements of Government-wide regulations 5 C.F.R. 351.402(a) and 351.701, the proposal was outside the agency's duty to bargain. The FLRA added that because the

union's proposal was outside the duty to bargain as inconsistent with Government-wide regulations, it was unnecessary to address whether the proposal was an appropriate arrangement under section 7106(b)(3) of the Statute.

NAGE, Local R4-45 and DOD, DECA, Central Region, 52 FLRA No. 33 (September 30, 1996), in this negotiability case, the Authority considered a proposal which stipulated "As a minimum the competitive area will include all of the bargaining unit". The agency could not implement the union's proposal consistent with 5 CFR 351.402 unless it included both unit and nonunit employees within the competitive area. The Authority noted that the proposal had to be interpreted as requiring the agency to include within the proposed competitive area all supervisory and managerial personnel within commissary stores included in the Union's bargaining unit.

The agency argued that the proposal was inconsistent with 5 CFR 351.402 because it would establish a competitive area limited to unit employees. The Authority determined that the proposal was consistent with 5 C.F.R. 351.402 because it would not prevent inclusion of both unit and nonunit employees within the minimum competitive area it establishes. However, the FLRA held that the Agency did not have a duty to bargain because the proposal directly implicated the conditions of employment of supervisory and managerial personnel.

AFGE, Local 1770 and DOD, DECA, Central Region, 52 FLRA No. 90 (January 31, 1997), the FLRA held that the agency did not have a duty to bargain over a union proposal which established a competitive area which was limited to bargaining unit employees. Specifically, the language was found inconsistent with a Government-wide regulation (5 C.F.R. 351.402(b)). Consequently, pursuant to section 7117(a)(1) of the Statute, the Authority concluded that the proposal was not within the duty to bargain. In this case the Union unsuccessfully argued that a bargaining unit constitutes an organizational unit within the meaning of that regulatory provision. However, the Authority interpreted that the term "organizational unit" refers to segments of the agency's administrative and functional structure that have been established by the Agency. The regulation, as written at the time of the decision, provided specific examples, "bureau, major command, directorate or other equivalent major subdivision of an agency" and "an activity under separate administration" (5 C.F.R. 351.402(b)).

In **AFGE, Local 1815 and Aviation Center and Fort Rucker, AL, 53 FLRA No. 60 (September 30, 1997)** a union's proposal to negotiate new competitive areas affecting bargaining unit positions within the agency was agreed to by the union and agency local negotiators. The proposal was subsequently disapproved by the agency head under section 7114(c) of the Statute Specifically, local negotiators agreed that “prior to changing any competitive areas affecting bargaining unit positions, the Employer agrees to negotiate the new competitive areas with the Union.” The agency head determined that the provision directly implicated the working conditions of supervisory and managerial personnel, and was thus outside the scope of mandatory bargaining. The FLRA held that while contract proposals concerning the working conditions of supervisors are outside the

scope of *mandatory* bargaining, an agency is fully empowered to bargain over, and to choose to agree to, a contract proposal that directly implicates the working conditions of its supervisors. Such proposals address permissive subjects of bargaining. Consequently, even if some of the competitive areas covered by this proposal also included supervisors, the proposal was enforceable unless it was otherwise inconsistent with the Statue. The agency could not specify any nonunit employees who would be affected by this proposal or any section of the Statute which would render it unlawful.

The case of **NAGE, Local R4-45, and DoD, Defense Commissary Agency, 54 FLRA No. 30 (May 29 1998)**, consolidated two negotiability appeals filed by the union concerning the same proposal, the same parties and substantially similar negotiability issues. The proposal stated, "At least thirty (30) days prior to issuance of RIF notices, bargaining unit employees with the lowest retention standing for their competitive level in the bargaining unit will be reassigned to the RIF affected bargaining unit location, reassigning the higher retention standing unit employee(s) to non-RIF affected unit location." The union's proposal required the agency to reassign employees, based on their retention standing, from one bargaining unit location to another, where they would perform identical duties in an identical position. As such, the reassignment required by the proposal only involved the *location* in which an employee would perform the duties of his or her position.

The FLRA held that the proposal was within the duty to bargain because it did not interfere with management's right to assign employees under section 7106(a)(2)(A) of the Statute. The FLRA noted that the proposal did not require the agency to fill a position at a second unit location at the election of the employee without regard to whether the agency wanted that position filled. The position at the second location already existed and was occupied. The FLRA further noted that the proposal did not affect the agency's right to determine whether the employee possessed the skills and qualifications needed to perform the duties of the position at the new location, because the agency had already made that determination when it assigned the employee to the same position at the first location. Thus, the FLRA concluded that the union's proposal did not affect management's right to assign employees under section 7106(a)(2)(A) of the Statute. The FLRA also found that the proposal did not interfere with management's right to select employees from any appropriate source under section 7106(a)(2)(C)(ii) of the Statute.

Conclusion:

If you have any questions concerning this reference guide, please contact the Field Advisory Services, Labor Relations Team, at (703) 696-6301. Our DSN is 426-6301.

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